SideBAR

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Message from the Chair

John G. McCarthy

While it is difficult for me to fathom, more than a fifth of my term as the Chair of your Section is already over. That realization caused me to consider what has transpired since October 1.

During those five months, a lot has happened in this country that highlights the importance of being actively involved in organizations like the Federal Bar Association and particularly this Section. I also took this opportunity to look forward toward the remainder of my term. When it ends on September 30, 2018, this country will be involved in mid-term Congressional elections. Regardless of political affiliation, I am sure that we can all agree that the months between then and now will be interesting ones in our capital, and possibly in federal courts throughout this nation.

During my time in this organization I have repeatedly witnessed members with different views working together to further our Association's mission – to strengthen the federal legal system and administration of justice. We are frequently asked to analyze and comment on proposed legislation and rules impacting the federal legal system. We sponsor or co-sponsor programs throughout the United States that educate members and non-members thereby improving the administration of justice. This newsletter gives our members an opportunity to be heard by thousands of fellow practitioners on significant developments affecting the federal legal system. Active involvement in the work of this Section allows each of us to contribute to the future of that system. Thus far in my term many of you have stepped forward and offered to help and I thank each of you that have done so. As my mother used to say, many hands make light work. We need as many hands as possible to continue the important work of this Section.

Finally, it is my great pleasure to inform you that for the first time in our Section's history we have liaisons from the Law Student Division participating in our leadership. Ashley Akers, Chair of the Law Student Division, has appointed two liaisons to our Section from her Division. James Kelly from the University of Mississippi School of Law and Royal Newman II from the University of Miami School of Law are the inaugural liaisons to our Section. They have already participated in a Section Board meeting and we all look forward to working with them to coordinate activities between our Section and the Law Student Division. **SB**

About the Chair • *John McCarthy is a trial attorney and partner in the New York City office of Smith, Gambrell & Russell, LLP, where he leads the litigation practice and is a member of the firm's Intellectual Property Law Group and its Commercial and Bankruptcy Law Practice. John is a former FBA Circuit Vice President and past Chapter President of the S.D.N.Y. Chapter; John most recently served as Vice Chair of the FBA Federal Litigation Section. He can be reached at jmccarthy@sgrlaw.com or (212) 907-9703.*

Inside this Issue

Federal Litigation Section News

Note from the Editor

Jeffrey T. Cox

All of a sudden it seems, these are turbulent times for our federal courts, with immigration and national security issues serving as catalysts for a robust national conversation about the importance of an independent judiciary.

As federal court practitioners, FBA Federal Litigation Section members know well the good works of our federal judges and their staffs, and all federal court employees. Despite a growing number of judicial vacancies in our federal system -- not least of which being the open seat on the U.S. Supreme Court, unoccupied since Justice Scalia's unexpected passing in February 2016 -- the business of the courts continues unabated, and our system of state and federal courts, and our societal commitment to an ordered society and the Rule of Law remains the envy of nations around the globe. Last month, the FBA Board of Directors adopted a Statement of Judicial Independence underscoring the independence of the judiciary as a foundational pillar of our constitutional democracy (a copy of the FBA Statement is at p. 10 of this edition of *SideBAR*).

This edition of *SideBAR* features a tremendous variety of articles from FBA members from coast to coast, including from members in California, Florida, New York, South Carolina and Utah addressing a range of federal practice topics. The articles range from changes to Rule 23 class action practice addressing notice and objector considerations; personal jurisdiction in Rule 23 proceedings (*Bristol-Myers Squibb Co. v. Superior Court*, on cert to the U.S. Supreme Court); Private Claims under the Americans with Disability Act's confidentiality provisions; subject matter jurisdiction considerations in light of *Lightfoot v. Cendant Mortgage Corp.*; mediating civil rights claims involving law enforcement; and the challenge of foreign language translation in federal court practice. The Federal Litigation Section is proud to showcase the work of members, and to celebrate the rich tapestry of American jurisprudence.

Our 4,000 FLS members receive this quarterly newsletter, and *SideBAR* welcomes submissions of scholarly articles for publication consideration. Please consider writing and publishing in *SideBAR*! And finally, thank you for reading *SideBAR*. **SB**

About the Editor • *Jeff Cox is a business and complex litigation attorney, and Partner at Faruki Ireland Cox Rhinehart & Dusing P.L.L., a business and complex litigation and white collar criminal defense practices with offices in Dayton and Cincinnati, Ohio. Jeff's practice includes intellectual property and technology disputes, competition-based litigation and professional malpractice and data security matters. A past president of the FBA's Dayton Chapter, Jeff serves on the Federal Litigation Section Board of Directors, as well as the FBA's Government Relations Committee and Professional Ethics Committee. Jeff can be reached at jcox@ficlaw.com or (937) 227-3704.*

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Federal Litigation Section News

Federal Litigation Section, In Partnership With The Wagstaffe Group, Presents How to Win a Case from a Judge's Perspective on April 4 in Washington, D.C., and April 6 in New York

Join the Federal Litigation Section on Tuesday, April 4 from 5:30-7:00 p.m. at American University Washington College of Law in Washington, D.C. The event will be moderated by Jim Wagstaffe and will feature Hon. Loretta Preska, former Chief Judge of SDNY District Court and Colonel Tara Osborn, Chief Trial Judge of the U.S. Army. Additional speakers to be announced. The program will include judges' perspectives on motions, how to make a home run motion, discovery disputes, and how to win a case, among other topics. This event is co-sponsored by the DC, Northern Virginia, and Pentagon Chapters of the FBA.

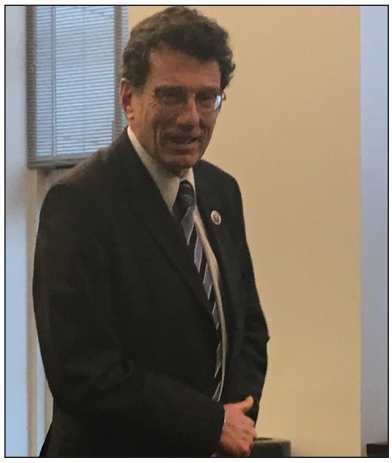
The program will be offered on April 6 in New York City from 5:00-7:30 p.m. at the Daniel Patrick Moynihan Courthouse. Mr. Wagstaffe and Judge Preska will be joined for the presentation by Hon. Vernon Broderick, U.S. District Judge (S.D.N.Y), and Hon. John Gleeson, U.S. District Judge (E.D.N.Y) (Ret.), now a partner at Debevoise & Plimpton LLP. **SB**

An Evening of Camaraderie Flows From FLS Generosity

The FBA Criminal Law Committee, Northern District of Ohio, sought to host a unique event based on some new beginnings. Recently in our District, we have acquired the new services of United States Attorney Carole Rendon and Federal Public Defender, Stephen Newman. Members of both offices thought it was an opportune moment to renew our commitment to both zealous advocacy and professionalism in the courtroom. We thought an afternoon social hour would be the optimal moment to foster these objectives.

But planning this event proved easier than procuring sponsorship. Because the U.S. Attorney's Office protocol prohibits any participation in an event underwritten by a private law firm, it appeared our idea of hosting a commemorative criminal bar FBA event would remain just that.

At our Chapter Board meeting, however, FLS Member Aaron Buloff suggested we request FLS sponsorship. Graciously, the FLS agreed to help sponsor this important event, which was held on Feb. 9, at the Stokes United States Courthouse in Cleveland, Ohio. For the first time in anyone's collective memory, federal prosecutors, federal defenders and private CJA attorneys gathered for an afternoon of socialization. Chief United States District Court Judge Solomon Oliver, Jr. and United States District Court Judge Dan Aaron Polster spoke about the particular preparedness of the criminal bar in our District. Ms. Rendon and Mr. Newman also said a few words. Lastly, Tony Vegh, FBA NDOH Chapter President thanked the FLS for its generosity and highlighted the benefits of FBA membership. Attendees agreed that the event fostered a spirit of camaraderie and professionalism that could only occur from a casual interaction outside the courtroom. Thank you FLS for allowing this event to move forward. **SB**



Judge Dan Polster (N.D. Ohio)

(L-R): Jacqueline Johnson, First Assistant Federal Public Defender, and Stephen Newman, Federal Public Defender (both N.D. Ohio)

(L-R): Chief Judge Solomon Oliver Jr., Magistrate Judge Jon Greenberg, and U.S. Attorney Carole Rendon (all N.D. Ohio)

Correction and Acknowledgment

The most recent Winter 2017 edition of *SideBAR* included an article entitled: "2016 Art Law Conference Recap." Unfortunately, the article reporting on the successful inaugural conference held in Miami, Florida in late November 2016 failed to recognize the excellent work of the host chapter, the FBA's Southern District of Florida Chapter; *SideBAR* regrets the oversight and extends congratulations for the hard work and excellent program!

Federal Bar Association

CAPITOL HILL DAY

Thursday, April 20, 2017

Plan to participate in this acclaimed event as FBA leaders from across the country meet with House and Senate offices to discuss important FBA legislative issues that impact the administration of justice and the federal courts. During meetings on Capitol Hill, FBA participants will discuss issues most critical to our Third Branch of government, including: adequate funding for the federal courts, filling judicial vacancies promptly, and sufficient judgeships to render justice.

FBA Capitol Hill Day is becoming more popular each year. Don't miss out on this opportunity to help broaden the FBA's visibility and influence in Congress.

Training and materials will be provided to Capitol Hill Day participants in advance of the event to provide issues understanding and advocacy effectiveness on the Hill. Participants also are responsible for scheduling their meetings with their Senate and House offices.

Between meetings, participants will have the opportunity to visit the Senate and House galleries, as well as the Capitol Visitors Center.

Capitol Hill Day is held in conjunction with the 2017 Leadership Training Program (April 21-22, 2017). All chapters, sections, and divisions are encouraged to send a representative to this event.

Because reimbursement is available for chapter representative attendees of the Leadership Training Program, these attendees will only need to incur the cost of one additional night of lodging. Section and Division representatives should follow National Policy No. 9-5 guidelines regarding reimbursement and receive approval from the Chair and Treasurer of their Section/Division. A discounted block of rooms has been reserved for attendees at the Capital Hilton. Reservations must be made by Friday, March 31, 2017 to receive the discounted rate. Call 1-202-393-1000 and refer to the "FBA Leadership Meeting" to reserve your room.

Participants of Capitol Hill Day are responsible for their booking travel and lodging in connection with this event.

Program

9:00 a.m.
Continental Breakfast Kickoff and Group Photo

10:00 a.m.
Participant meetings with Senate and House offices begin and continue into the afternoon

Lunch
On Your Own

4:00 p.m.
Group debriefing on Hill meetings

Registrant Information

Name _____ Title _____

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Email Address _____

Please email the completed registration form to Debbie Smith, chapters coordinator, at dsmith@fedbar.org. Visit www.fedbar.org/CapitolHill17 for additional information and to register online today!

Federal Bar Association

Litigation Alert: Private Claims Under The Americans With Disabilities Act's Confidentiality Provisions—Practical Tips For Litigation And Litigation Avoidance

Samuel Blaustein

Introduction

The collection and storage of medical records has become a hot-button issue in employment litigation. Recent developments concerning the Americans With Disabilities Act's (ADA) confidentiality provisions present novel issues that corporate counsel and employment law practitioners should be prepared to confront. Specifically, court decisions and administrative guidance from the Equal Employment Opportunity Commission (EEOC) suggest that disabled as well as non-disabled job applicants as well as employees have standing to pursue private claims for violations of the ADA's confidentiality provisions. Subsequent decisions have held that the exhaustion of administrative remedies before the EEOC is not a prerequisite to seeking judicial relief.

The EEOC has offered only limited guidance as to how employers may ensure its medical inquiry and record keeping policies comply with the ADA. However, certain best practices and litigation strategies can minimize and perhaps avoid an employer's potential exposure before the EEOC or in arbitration and litigation. The ADA's confidentiality rules, relevant decisions and administrative guidance are discussed below and followed by practical tips for employers in light of the expanded scope of the ADA.

The ADA's Confidentiality Provision Applies To Pre-Employment And Post-Employment Medical Inquiries And Record Collection

Certain employers are required by law to collect and maintain medical records to ensure that their employees are able to fulfill their required job functions. Similarly, some employers have encouraged employees to take part in voluntary wellness and other programs that require the collection and maintenance of medical records. Other employers have introduced drug and alcohol testing policies. While many employers and their counsel are aware of the privacy rules imposed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), they are equally aware that HIPAA does not provide for a private right of action as instead enforced by the U.S. Dept. of Health and Human Services.[1] Although necessary, and perhaps even laudable, the collection of medical information presents a variety of concerns that employers and their counsel should be aware of in light of the availability of a private right of action under the ADA.

The ADA provides different standards for the collection of medical records during the pre-employment, post-offer and employment phases of an applicant's career. 42 U.S.C. § 12112(d)(2), (3) and (4).[2] The ADA requires that "information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record." 42 U.S.C. § 12112(d)(3)(B). Department of Labor regulations promulgated pursuant to the Genetic Information Nondiscrimination Act of 2008 (GINA) require the same treatment with respect to "genetic information" collected by an employer. 29 C.F.R. § 1635.9. Although not expressly set forth in the ADA, recent EEOC regulations cross-referencing the ADA make clear that the confidentiality provisions encompass electronically stored information (ESI). *Id.*[3]

Recent Decisions Hold That The ADA's Confidentiality Provisions May Authorize A Private Right Of Action By Both Disabled And Non-Disabled Job Applicants And Employees Without The Need To Exhaust Administrative Remedies For Violation Of The Privacy

Employers are often confronted with employment discrimination claims asserted under the ADA. Typical employment discrimination claims focus on the employee's perceived or actual disability and are adjudicated under the familiar *McDonnell* burden shifting test. Discrimination claims usually require that a claimant exhaust their administrative remedies at the EEOC level and afford the employer an opportunity to rebut the claim or settle prior to commencement of litigation.

Conversely, recent holdings have recognized a right of confidentiality in medical records collected and stored by an employer and a corresponding private right of action accruing "as soon as an employer conducts an unlawful medical examination or initiates a prohibited medical inquiry."[4] Generally, a claimant seeking relief under the ADA's confidentiality provisions must establish that (1) the employer obtained the claimant's medical information through employment-related medical examinations and inquiries, (2) the information obtained was disclosed by the employer rather than treated as confidential or disclosed pursuant to a statutory exception, and (3) damages.[5]

Recent holdings provide that the ADA's confidentiality rules apply even where medical inquiries and record retention is required by law.[6] Several influential circuit courts, most recently the Fifth Circuit in 2015, have held that a disability is not required to establish standing. [7] The EEOC shares this position.[8] At least one district court has held that a claimant is not required to exhaust their administrative remedies before the EEOC prior to filing a complaint under the ADA's confidentiality provisions.[9] The foregoing and similar holdings present serious concerns for employers as they may both enable and encourage potential claims be brought under the ADA in federal court as opposed to under less favorable state laws.[10] Employers should therefore take steps to ensure that their company's medical records collection and storage policies comply with the ADA and be prepared to deal with associated litigation.

Best Practices—Litigation & Discovery Pointers

In the age of paper filing, a lock-and-key was sufficient to maintain a document as confidential. However, in the age of electronic record keeping, the concept of what is private and confidential has become obscured and the EEOC has

offered scant guidance as to how employers may comply. Accordingly, employers must be prepared to deal with the realities of ESI and consult with counsel and, if necessary, technology professionals, to ensure compliance.[11] At the very least, employers should comply with HIPAA's privacy guidelines and best practices.[12] Additionally, in May of 2016 the EEOC offered some guidance as to what "may be required by law" or be "best practices" with respect to confidential medical records as follows:

It is critical to properly train all individuals who handle medical information about the requirements of the ADA and, as applicable, HIPAA's privacy, security, and breach requirements and any other privacy laws.

Employers and program providers should have clear privacy policies and procedures related to the collection, storage, and disclosure of medical information.

On-line systems and other technology should guard against unauthorized access, such as through use of encryption for medical information stored electronically.

Breaches of confidentiality should be reported to affected employees immediately and should be thoroughly investigated.

Employers should make clear that individuals responsible for disclosures of confidential medical information will be disciplined and should consider discontinuing relationships with vendors responsible for breaches of confidentiality.[13]

Despite best efforts, litigation cannot always be prevented. However, when in doubt, medical information should be treated as confidential and its existence set forth in a privilege log or in another appropriate manner.[14] For instance, where a litigant sought disclosure of a "personnel file" and did not receive medical information, a motion for sanctions was denied because the defendant "readily admitted to the existence" of the relevant records and "explained that they are kept in a separate file because it considers them medical records."[15]

Familiar defenses, including failure to state a claim and waiver, also remain available in the confidentiality context. Specifically, where a disclosure is voluntary it may constitute a complete defense.[16] For instance, where a claimant voluntarily provided a doctor's note to substantiate a time off request, the court dismissed a resulting confidentiality claim.[17] Likewise, if an unauthorized disclosure is part of an EEOC claim, the administrative exhaustion requirement may still be required.[18] Finally, although the threshold is low at the pleading stage, a claimant must allege real damages in order to set forth a prima facie case.[19]

Conclusion

Corporate counsel and employment litigators should become familiar with the ADA's confidentiality provisions and take steps to ensure that the entities which they represent adopt the best practices outlined above. To the extent litigation becomes a reality, counsel should first determine whether the complained of disclosure implicates the ADA; whether the administrative exhaustion requirement has been met and raise any other appropriate defenses.

Sam Blaustein is a litigation partner at Dunnington Bartholow & Miller LLP in New York. Prior to joining Dunnington, Mr. Blaustein served as a law clerk in the Southern District of New York. He can be reached at sblaustein@dunnington.com.

Endnotes

[1]Pub. L. 104-191.

[2]*See also* 29 C.F.R. § 1630.14 and *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act ("Enforcement Guidance ")*, EEOC Notice No. 915.002 (July 27, 2000) available at www.eeoc.gov/policy/docs/guidance-inquiries.html.

[3]In May of 2016 the EEOC released a final ruling concerning employee wellness programs that offers new guidance with respect to the ADA's confidentiality provisions. 81 FR 31126-01 (May 17, 2016).

[4]*Henderson v. Borough of Baldwin*, No. 15-1011, 2016 WL 5106945, at *3 (W.D. Pa. Sept. 20, 2016) *citing Katz v. Adecco USA, Inc.*, 845 F.Supp.2d 539, 545 n. 7 (S.D.N.Y. 2012) ("Plaintiff states a cognizable ADA claim by alleging that Defendant improperly disclosed his confidential medical information.")

[5]*Sheets v. Interra Credit Union*, No. 1:14-CV-265 JD, 2016 WL 362366, at *7 (N.D. Ind. Jan. 29, 2016), *aff'd*, No. 16-1440, 2016 WL 7365797 (7th Cir. Dec. 19, 2016).

[6]*E.E.O.C. v. Celadon Trucking Servs., Inc.*, No. 1:12-CV-00275-SEB, 2015 WL 3961180, at *18 (S.D. Ind. June 30, 2015) *citing* 49 C.F.R. § 391.41 (medical testing and records storage required by Department of Transportation Regulations must be in accordance with ADA confidentiality provisions).

[7]*Harrison v. Benchmark Elecs. Huntsville, Inc.*, 593 F.3d 1206, 1214 (11th Cir. 2010). ("we now explicitly recognize that a plaintiff has a private right of action under 42 U.S.C. § 12112(d)(2), irrespective of his disability status."); *Taylor v. City of Shreveport*, 798 F.3d 276, 284 (5th Cir. 2015) (citations omitted).

[8]*Spencer T. v. Megan H. Brenna, Postmaster General,* EEOC Appeal 0120112516, 2015 WL 1607742, at *4 (Apr. 2, 2015).

[9]*Mahran v. Benderson Dev. Co., LLC*, No. 10-CV-715A, 2011 WL 2038574, at *1 (W.D.N.Y. May 24, 2011) ("the confidentiality provisions of the ADA . . . create their own private right of action and carry obligations independent of any provision of the ADA concerning employment discrimination. Because plaintiff was not alleging that the breach of confidentiality in itself led to any adverse employment actions, and because any requirement to file a prior complaint with the EEOC related only to adverse employment actions, a prior filing with the EEOC was not necessary.").

[10]*El Paso Cty. v. Vasquez*, No. 08-15-00086-CV, 2016 WL 2620115 (Tex. App. May 5, 2016) (Distinguishing protections afforded by the ADA and the Texas Commission on Human Rights Act ("TCHRA"). Tex. Labor Code Ann. § 21.001 et seq.)

[11]*Gleason v. Scoppetta*, 566 F. App'x 65, 68 (2d Cir. 2014) *on remand Gleason v. Scoppetta*, No. 12 CV 4123 RJD RLM, 2014 WL 5780729, at *4 (E.D.N.Y. Nov. 5, 2014) (granting leave to file ADA confidentiality claim where plaintiff alleged use of "false logins" to obtain electronically stored medical information); *In re Nat'l Hockey League Players' Concussion Injury Litig.*, 120 F. Supp. 3d 942, 952-953 (D. Minn. 2015) (noting that most, but not all, ADA confidentiality cases are asserted in the context of a discrimination claim and holding that the ADA does not provide an absolute shield to discovery in civil actions and ordering disclosure of certain ESI with protections to "account for the highly sensitive and confidential nature of the information.").

[12]*See* Note 2, *supra*, and www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html?language=es

[13]*See* Note 3, *supra*.

[14]While HIPAA does not provide for a private right of action, the ADA, with reference to HIPAA, does. *See* Note 3. Interestingly, drug testing is not a medical inquiry but alcohol testing is. *See* 29 C.F.R. § 1630.16(c)(1). Nevertheless, any information that may relate to a disability must be treated as confidential and best practices require erring on the side of caution.

[15]*Marshall v. Town of Merrillville*, No. 2:14-CV-50-TLS, 2015 WL 4232426, at *5 (N.D. Ind. July 13, 2015).

[16]*Perez v. Denver Fire Dep't*, No. 15-CV-00457-CBS, 2016 WL 379571, at *3 (D. Colo. Feb. 1, 2016).

[17]*Lewis v. Baltimore City Bd. of Sch. Commissioners*, 187 F. Supp. 3d 588 (D. Md. 2016).

[18]*Deravin v. Kerik,* 335 F.3d 195, 201 (2d Cir. 2003).

[19]*Lawson v. Avis Budget Car Rental, LLC*, No. 15-CV-01510 (GBD), 2016 WL 3919653, at *7 (S.D.N.Y. July 12, 2016), *reconsideration denied sub nom.* 2016 WL 5867444 (S.D.N.Y. Oct. 4, 2016).

Amending Rule 23: Modernizing Class Notice and Debunking Bad-Faith Objectors

Lance Harke and Barbara Lewis

Proposed amendments to Rule 23 of the Federal Rules of Civil Procedure target class action settlements. The amendments, which were drafted by the Federal Rules Advisory Committee, were approved for public comment in August 2016 by the Standing Committee on Rules of Practice and Procedure and if approved, would likely not take effect until Dec. 1, 2018. Unlike the changes to the discovery rules, the Rule 23 proposals are modest and have not triggered significant opposition. The proposals primarily address the notice to class members, the procedures relating to settlement approval, and class member objections.

Several of the amendments warranting discussion include changes made to the class notice form and an attempt to address "bad faith" objectors.[1] The proposed amendment to class notice now makes it clear that "best notice" may be by electronic means. An essential part of every class action is determining who the class members are. Because class notice plays a significant role in alerting consumers whose rights may be affected by a class action lawsuit, the standard under Rule 23(c)(2)(B) is "the best notice that is practicable under the circumstances." Until recently, only direct notice via first-class mail met this requirement. Though the rules make no mention of a particular method for notice, the Supreme Court found in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) that notice should be via first-class mail and since then, courts have generally been reluctant to endorse electronic notice as a substitute for first-class mail.

But forty years have passed since *Eisen* and advancements in technology have drastically changed the way people communicate. People are increasingly relying on electronic forms of communication. Not surprisingly, some courts have begun to take baby steps towards allowing electronic or digital notice (albeit these are usually allowed in conjunction with traditional forms of media).[2] Thus, the proposal finally updates the rule to reflect the reality of today's society.

And, the flexibility in the proposed language ("or other appropriate means") reminds courts to consider a wide variety of options when choosing the form for notice—including new technology that may develop in the future.

Of course, electronic notice is not appropriate in every case. There continues to be a segment of the U.S. population that do not regularly use, or even have access to the internet.[3] Those opposing the proposal fear that this group of people will get neglected as electronic alternatives replace first-class mail. But, the proposal does not change the "best notice" standard (and expressly includes "U.S. mail" as an option) so in deciding which form to select for notice, courts will continue to look at the particular circumstances of a case to select the notice that will most effectively and efficiently target potential class members—no matter how traditional the form may be.

The proposed amendment regarding class action objectors introduces a way to scrutinize "bad-faith" objectors in an effort to deter frivolous objections that are a detriment to the settlement process. Class members who are unhappy with the terms of a settlement have a right to object under Rule 23(e)(5). "Bad-faith" objectors, also called "professional" or "serial" objectors, have tainted this process by using their objections for personal gain rather than assisting in the settlement review process.[4] These objectors submit vague and baseless objections, rarely attend the fairness hearings, and then appeal when the settlement is approved with the intention of delaying the settlement process until they can extort a side payment (known as a "greenmail" payment). Objectors like this can cause significant

delay to class members seeking any recovery from the suit. It has become a very serious problem in the class action settlement process as there are more professional objectors today than ever before.

To be sure, plaintiff attorneys and defense counsel have tried to stop professional objectors, with various tactics, such as seeking limited discovery into the arrangement between the objectors and their attorneys to expose the motivation behind the objection.[5] One firm has even gone so far as to file a racketeering and abuse of process lawsuit against the lawyers representing these objectors (who tend to be the ones who actually draft and prepare the objections).[6] The changes in the proposed amendments aim to deter bad-faith objectors from presenting baseless claims to obtain payoffs. One change requires objectors to state the grounds for their objection "with specificity" and indicate whether the objection applies to the objector, a subset of the class, or the entire class, since objections that apply to the entire class are more likely to be meritorious. Another change requires a court to approve any payment to an objector or an objector's counsel for withdrawing an objection or appeal. The amendment would dissuade objectors from demanding greenmail payments if they know those payments are subject to judicial scrutiny and could potentially result in sanctions.

Do the proposed amendments go far enough to stop these objectors? Only time will tell. In theory, the new requirements in the proposed amendments should dissuade serial objectors from filing meritless objections. Requiring specificity and support for objections and adding barriers to withdrawal may lead to a decrease in frivolous objections. These amendments may pressure the parties to settle objections before they are filed to avoid any delay in the settlement approval process. Professor Brian T. Fitzpatrick, who studies the challenges posed by objectors, believes banning side payments to objectors would eliminate bad-faith objectors without discouraging good faith objectors who are not in it for the money.[7] Up until now, attempts to screen out and deter bad-faith objectors have focused on the objection after it has already been presented to the court. With these proposed amendments, efforts should now focus on addressing the problem before it becomes a very expensive and time consuming proposition. **SB**

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Endnotes

[1]The other amendments are mostly either stylistic changes or proposals that simply codify what has been common practice for the courts and parties in class action litigation. For example, one of the changes amends Rule 23(e)(2) identifies factors that a court must consider in its determination. However, circuit courts have developed their own set of approval factors and are not bound by any of the factors listed in the amendment. Rule 23(e)(1) mandates that notice of a proposed settlement be given to class members. The new rules require the parties to provide the court with "sufficient" information to decide whether to order class notice, and require the court to determine that a proposed settlement is likely to earn final approval before it sends notice to the class. Experienced class action attorneys already follow this practice when presenting a proposed settlement. The changes also clarify that appeals from an order directing notice are not appealable even if the class is certified as part of the settlement approval process—something that is already understood amongst class action practitioners.

[2]The class notices approved by these courts often incorporate either email, social media, or both. *See e.g. In Re Nat. Football League Players' Concussion Injury Litig.*, 307 F.R.D. 351, 385 (E.D. Pa. 2015) (notice included advertisements on popular sites such as CNN.com, Facebook.com, Weather.com, and Yahoo!); *Cooper v. E. Coast Assemblers, Inc.*, No. 12-80995- CIV, 2013 WL 308880, at *4 (S.D. Fla. 2013) (court allowed Plaintiff's counsel to email the Notice to class members); *Mark v. Gawker Media LLC*, No. 13-cv-4347 (AJN), 2015 WL 2330274 (S.D.N.Y. 2015) (notice included the use of social media such as Twitter).

[3]Monica Anderson and Andrew Perrin, "13% o f Americans don't use t he internet. W ho are they?," Pew Research Center (September 7, 2016) (www.pewresearch.org/fact-tank/2016/09/07/some-americans-dont-use-the-internet-who-are-they/).

[4]*See e.g. In re Polyurethane Foam Antitrust Litig.*, 178 F. Supp. 3d 635, 639 (N.D. Ohio 2016) ("The serial objector's ultimate goal is extortion."); *In re Initial Pub. Offering Sec. Litig.*, 728 F.Supp.2d 289, 295 (S.D.N.Y.2010) ("[P]rofessional objectors undermine the administration of justice by disrupting settlement in the hopes of extorting a greater share of the settlement for themselves and their clients."); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1362 (S.D. Fla. 2011) ("professional objectors [] whose sole purpose is to obtain a fee by objecting to whatever aspects of the Settlement they can latch onto").

[5]*See e.g.* Plaintiff's Motion for Leave to Conduct Limited Discovery, *Wright v. Nationstar Mortgage LLC*, No. 14-cv-10457 (N.D. Ill, May 12, 1998).

[6]Complaint, *Edelson, PC v. The Bandas Law Firm, PC, et al.*, No. 1:16-cv-11057 (N.D. Ill, December 05, 2016).

[7]Perry Cooper, "Solutions Afoot for Curbing Class Action Gadflies," Bloomberg BNA (June 24, 2016) (www.bna.com/solutions-afoot-curbing-n57982074748/).

Bristol-Myers Squibb Co. v. Superior Court: *Will California Be The New Forum Of Choice For Nationwide Class Actions?*

Erik W. Kemp and Elizabeth Holt Andrews

We all remember learning the basics of personal jurisdiction in civil procedure during our first semester of law school— maybe even on the first day of class. In reality, the issue is not frequently litigated in this day and age. Recently, however, the prevalence of nationwide mass tort litigation has once again vaulted personal jurisdiction to the forefront of the national conversation on civil procedure.

In August 2016, the California Supreme Court issued a landmark 4-3 ruling in *Bristol-Myers Squibb Co. v. Superior Court* on the issue of personal jurisdiction in a joint nationwide products liability action.[1] In a nutshell, the majority opinion held that a lack of specific personal jurisdiction did not bar California courts from presiding over a joint action brought by resident and nonresident plaintiffs against a nonresident defendant.[2] In other words, California was held to be an appropriate jurisdiction for nonresident plaintiffs to pursue their claims against nonresident defendants— so long as these claims were part of a joint action that included at least some Californians as well.

In January 2017, following a petition for certiorari and a flurry of amicus briefs in support, the United States Supreme Court took up the case for its spring calendar.

The case has important implications for federal practitioners. In the Ninth Circuit, of which California is a part, federal district courts generally apply the personal jurisdiction law of the state where the court sits (unless a federal statute independently determines personal jurisdiction).[3] So if *Bristol-Myers Squibb* is affirmed, California's famously plaintiff-friendly courts—both state and federal—are poised to become the nationwide jurisdiction of choice for most nationwide products liability litigation, as well as many other types of mass tort actions.

Proceedings in the Trial Court

As is typical for a case that turns on personal jurisdiction, *Bristol-Myers Squibb* is wending its way through the appellate system after barely getting off the ground at the trial court level. At the heart of the case is the defendant's drug Plavix, which is used to inhibit blood clotting.[4] Six hundred seventy-eight plaintiffs—86 California residents and 592 nonresidents—filed a total of eight lawsuits against Bristol-Myers Squibb ("BMS") in San Francisco Superior Court, claiming various injuries caused by the drug including heart attack, stroke, and even death.[5] The Superior Court designated the matter complex and consolidated all the lawsuits before Judge John E. Munter.[6]

BMS immediately moved to quash service of summons for lack of personal jurisdiction with respect to the out-of-state residents—who comprised the vast majority of the plaintiffs.

Judge Munter denied the motion, reasoning that BMS had subjected itself to general personal jurisdiction in California because of its "wide-ranging, systematic and continuous contacts" with the state.[7] In support of his decision, he noted that the defendant had sold more than $1 billion worth of Plavix in California, had been registered to conduct business in the state since 1936, and currently maintains an agent for service of process in Los Angeles.[8]

Proceedings in California's Intermediate Appellate Court

BMS responded to Judge Munter's ruling by filing a writ of mandate in the First Appellate District in San Francisco, seeking to overturn the interim order. Judge Brick of the Alameda County Superior Court, who was sitting on the appellate panel by assignment, authored a unanimous majority opinion rejecting Judge Munter's reasoning that BMS had subjected itself to general personal jurisdiction in California.[9] However, Judge Brick went on to examine the issue of specific personal jurisdiction—a question which Judge Munter had not reached.[10]

Judge Brick's opinion led off with a treatise-worthy mini-tutorial on the jurisprudential history of personal jurisdiction, beginning with seminal cases known to every 1L: *Pennoyer*[11] and *International Shoe.*[12] He then moved forward in time to the modern—though scarcely less seminal—cases of *Goodyear*[13] and *Daimler.*[14] He concluded that *Goodyear* and *Daimler* prevented a finding of general jurisdiction because there was insufficient evidence that BMS was "at home" in California.[15]

Moving to the question of specific personal jurisdiction, he concluded that the Superior Court could exercise this type of jurisdiction over the nonresidents' claims against BMS, as well as those of California residents.[16] He ran through the factors: (1) whether the defendant has purposefully directed its activities at the forum state, (2) whether the plaintiffs' claims are related to or arise out of these forum-directed activities, and (3) whether the exercise of jurisdiction is reasonable.[17] Ultimately, his analysis of each factor favored plaintiffs. BMS's writ petition was denied.[18]

Proceedings in the California Supreme Court

BMS next petitioned for review in the California Supreme Court. The petition was granted in November 2014. Nearly two years later, after what must have been considerable wrangling among the Justices behind closed doors, the First Appellate District's ruling was affirmed by a narrow 4-3 majority.

The majority opinion by Chief Justice Tani G. Cantil-Sakauye runs through the same three-factor test for specific jurisdiction utilized by Judge Brick and, like him, concludes that each factor weighs in favor of the California courts' exercise of personal jurisdiction over the non-resident plaintiffs' claims against the defendant.[19] The 3-justice dissent, authored by Justice Kathryn M. Werdegar, is vigorous and lengthy in its criticism of the majority's reasoning.[20]

Principally, the fault line between the state high court's majority and dissent lies in the second factor in the analysis: the "arising-from-or-related-to" factor. The Justices' disagreement stems from fundamentally different ways of characterizing BMS's marketing and distribution efforts.

The majority emphasizes that these efforts are nationwide in scope. As the Chief Justice puts it, "[b]oth the resident and nonresident plaintiffs' claims are based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product, which allegedly caused injuries in and outside the state. . . . BMS's nationwide marketing, promotion, and distribution of Plavix created a *substantial nexus* between the nonresident plaintiffs' claims and the company's contacts in California

concerning Plavix."[21]

The dissent, by contrast, is unmoved by the uniformity of BMS's nationwide marketing and distribution. Instead, Justice Werdegar uses similar phraseology to argue for the opposite result: "BMS promoted and sold Plavix in this state, giving rise to the California plaintiffs' claims. BMS also engaged in such promotion and sales in many other states, giving rise to claims by residents of those states. As all the claims derive from similar conduct and allege similar injuries, the nonresident plaintiffs' claims closely resemble those made by California residents. But I can perceive no substantial nexus between the nonresidents' claims and BMS's California activities."[22]

The "substantial nexus" language relied upon by the majority and the dissent is self- consciously echoing a line of authority in the California Supreme Court dating back to the forty- year-old case Cornelison v. Chaney.[23] Importantly, however, this precise concept does not feature prominently in the federal case law on specific personal jurisdiction. Indeed, Justice Scalia once mocked "substantial nexus" as "an indeterminate phrase that lacks all pedigree," commenting in 2012 that "[o]ur case law has used it as a term of art in only one context," namely in analyzing the Commerce Clause.[24]

Ultimately, however, the Chief Justice's "substantial nexus" analysis persuaded one more Justice than Justice Werdegar's take on the same phrase. As of this writing, the original 2013 order from Judge Munter still stands, and BMS's attempts to quash service of summons have thus far been unavailing.

Proceedings in the United States Supreme Court

Having taken a beating at all three levels in the California state court system, BMS filed a petition for certiorari to the United States Supreme Court. Briefing is getting underway, and the hearing is scheduled for Tuesday, April 25, 2017.

The parties—and, to date, five amici—are bringing in the heavy guns for the high court. Bristol-Myers Squibb has retained Neal K. Katyal of Hogan Lovells, a former acting Solicitor General, tenured professor of constitutional law at Georgetown, and active member of the #appellatetwitter community. For their part, plaintiffs have hired Thomas C. Goldstein of Goldstein & Russell, whose web page indicates he has personally argued thirty-eight cases in the Supreme Court in the last fifteen years and served as counsel for more than a hundred. Whatever your view of the merits, it will be fascinating to watch these two distinguished federal practitioners squaring off before the Justices.

And what will the outcome be? This may boil down to how quickly (or slowly) Judge Neil Gorsuch's nomination proceeds through the Senate. At present, SCOTUS does not have the same advantage that the California Supreme Court currently enjoys: an odd number of justices, which enables it to reach a firm substantive decision even on its most contentious cases. Given how sharply the California Supreme Court has divided on this issue—and the high stakes of the outcome for the future of mass tort litigation in America—it's anyone's guess how the high court will rule. Lawyers across the country will no doubt be watching this West Coast case with great interest. **SB**

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Endnotes

[1]*Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874 (Cal. 2016), *cert. granted*, 85 U.S.L.W. 3181 (U.S. Jan. 19, 2017) (No. 16-466).

[2]*Id.* at 894.

[3]*Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

[4]*Bristol-Myers Squibb*, 377 P.3d at 878.

[5]*Id.*

[6]*Plavix Product & Marketing Cases*, No. CGC 13 004748 (San Francisco Super. Ct. Feb. 8, 2013) (order assigning coordination motion judge).

[7]*Plavix Product & Marketing Cases*, No. CGC 13 004748 (San Francisco Super. Ct. Sept. 23, 2013) (order denying motion to quash service of summons for lack of personal jurisdiction).

[8]*Id.* at 2.

[9]*Bristol-Myers Squibb Co. v. Superior Court*, 175 Cal. Rptr. 3d 412 (Ct. App. 2014).

Statement of the FBA Board of Directors on Judicial Independence

Judicial independence, free of external pressure or political intimidation, lies at the foundation of our constitutional democracy. An independent judiciary needs to remain free of undue influence from the legislative and executive branches and to remain beholden only to the maintenance of the rule of law and the protection of individual rights and personal liberties. We affirm the right to challenge a judge's ruling for reasons based in fact, law or policy. However, when robust criticism of the federal judiciary crosses into personal attacks or intimidation, it threatens to undermine public confidence in the fairness of our courts, the constitutional checks and balances underlying our government and the preservation of liberty.

[10]At the time of his order, Judge Munter did not yet have the benefit of the United States Supreme Court's ruling in *Daimler AG v. Bauman*, 571 U.S. , 134 S. Ct. 746 (2014), which may have affected the outcome of his decision.

[11]*Pennoyer v. Neff*, 95 U.S. 714 (1878).

[12]I*nternational Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[13]*Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

[14]*Daimler AG v. Bauman*, 571 U.S.__, 134 S. Ct. 746 (2014).

[15]*Bristol-Myers Squibb*, 175 Cal. Rptr. 3d at 424.

[16]*Id.* at 415.

[17]*Id.* at 425–39.

[18]*Id.* at 440.

[19]*Bristol-Myers Squibb*, 377 P.3d at 886–94.

[20]*Id.* at 894–910.

[21]*Id.* at 888 (emphasis added).

[22]*Id.* at 898 (emphasis added).

[23]545 P.2d 264, 268 (1976).

[24]*Pacific Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 225 (2012) (Scalia, J., dissenting).

Supreme Court Requires Independent Basis For Subject Matter Jurisdiction Over Fannie Mae

Bill Killough and John Fletcher

In *Lightfoot v. Cendant Mortgage Corp.*, No. 14-1055 (U.S. Jan. 18, 2017), the Supreme Court addressed the issue of whether a statutory federal charter, which includes the power to "sue and be sued," confers federal jurisdiction over the chartered entity. Specifically, the Court held that language in Fannie Mae's charter, authorizing suit in federal or state courts "of competent jurisdiction" did not, in and of itself, confer federal subject matter jurisdiction.

Instead, in every federal case involving Fannie Mae, there still must be an independent basis for federal subject matter jurisdiction (diversity or federal question).

Under Title III of the National Housing Act, the Administrator of the Federal Housing Administration (FHA) was empowered to create federal mortgage associations, which would have, *inter alia*, the authority "to sue and be sued, complain and defend, in any court of law or equity, State or Federal." The Administrator exercised that power in 1938 to create the Federal National Mortgage Association, commonly known as "Fannie Mae." At that time, Fannie Mae was wholly owned by the federal government.

In 1954, Congress rechartered Fannie Mae. At that time, it was no longer owned exclusively by the federal government, with private investors owning its common stock. The 1954 statute authorized Fannie Mae "to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal."

In 1964, Fannie Mae became entirely privately owned, becoming "a Government-sponsored private corporation." *See* 12 U. S. C. §1716b. Fannie Mae spun a part of its portfolio into a new entity, the General National Mortgage Association (commonly called "Ginnie Mae"). Fannie Mae participated in the secondary mortgage market, purchasing and repackaging mortgages into mortgage-backed securities for sale. Under 1968 legislation, Congress granted Fannie Mae and Ginnie Mae the power "to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal." *See* 12 U.S.C. §1723a(a).

The lawsuit in *Lightfoot* involved a mortgage loan Cendant Mortgage Corporation made to Beverly Hollis-Arrington. Fannie Mae purchased that loan, though Cendant continued to service it. The borrower defaulted and unsuccessfully tried to work out a forbearance arrangement with Cendant. The borrower and her daughter, Crystal Lightfoot, attempted to resolve the issue through bankruptcy proceedings and transfers of the underlying property between themselves. Ultimately, the property was sold via foreclosure sale.

Lightfoot and her mother sued, *inter alia,* Fannie Mae in state court. Fannie Mae removed the action pursuant to 28 U.S.C. § 1441 (allowing removal of cases within federal courts' "original jurisdiction"). Fannie Mae's only asserted ground for jurisdiction was the "to sue and to be sued" language in its statutory charter, 12 U.S.C. §1723a(a).

The district court dismissed the claims against Fannie Mae on preclusion grounds, and the Ninth Circuit initially affirmed. It then withdrew its opinion and requested that the parties brief the question of whether the district court had subject matter jurisdiction in the first instance. Ultimately, the Ninth Circuit again affirmed the district court,[1] concluding that, under the Supreme Court's opinion in *American National Red Cross v. S.C.*,[2] Fannie Mae's charter statute conferred subject matter jurisdiction. Specifically, the Ninth Circuit interpreted the Red Cross case to mean that when a statutory charter contains a "sue-and-be-sued" clause that expressly references federal courts, it creates federal subject-matter jurisdiction.[3]

The Supreme Court granted certiorari, in part because three circuits[4] had held that a charter statute containing such language actually created federal court jurisdiction, while four other circuits[5] had disagreed. The Court resolved this circuit split and reversed the Ninth Circuit's conclusion that there was federal subject matter jurisdiction. Justice Sotomayor delivered the opinion of a unanimous Court.

The Court began by noting that the "sue-and-be-sued" language in Fannie Mae's federal charter (as in other similar statutes) is primarily designed to "serve[] the uncontroversial function"[6] of setting forth the principle that Fannie Mae is generally able to bring lawsuits and be sued. The Court concluded that the statute did not further authorize suit by or against Fannie Mae in federal court in *every case*.

The Court began by noting that this was not the first time it had addressed the issue. In fact, in five prior cases, the Court held that three statutes created jurisdiction, while two others did not.

In one case, the Court held that the charter of the first Bank of the United States—which authorized it "to sue and be sued .

. . in courts of record, or any other place whatsoever"—did not create federal jurisdiction.[7]

The Court later held that the charter of the *second* Bank of the United States conferred federal jurisdiction when it authorized the Bank to sue or be sued "in all State Courts having competent jurisdiction, and in any Circuit Court of the United States."[8]

The Court next held that a charter did not create federal jurisdiction where it authorized a railroad to sue or be sued "in all courts of law and equity within the United States."[9]

Next, the Court concluded that the FDIC's charter created federal jurisdiction when it authorized it to sue and be sued "in any court of law or equity, State or Federal."[10]

Finally, the Court held that the Red Cross could be sued in federal court under its charter language permitting it to sue and be sued "in courts of law and equity, State or Federal, within the jurisdiction of the United States."[11]

In *Red Cross,* the Supreme Court synthesized these cases into a rule that a charter *might* "confer federal court jurisdiction if, but only if, it specifically mentions the federal courts."[12] However, the *Lightfoot* Court concluded that simply mentioning federal courts is not enough. Fannie Mae's charter, which authorized suit "in any court of competent jurisdiction, State or Federal,"[13] obviously expressly referred to federal court. However, the Court determined that this was not enough to confer jurisdiction.

Unlike other cases finding charters to confer subject matter jurisdiction, Fannie Mae's charter only refers to federal courts "of competent jurisdiction."[14] The Court concluded that this inclusion of a "competent jurisdiction" requirement in Fannie Mae's charter statute controlled:

> A court of competent jurisdiction is a court with the power to adjudicate the case before it. *See* Black's Law Dictionary 431 (10th ed. 2014) ("[a] court that has the power and authority to do a particular act; one recognized by law as possessing the right to adjudicate a controversy"). And a court's subject-matter jurisdiction defines its power to hear cases. [Citations omitted.] It follows that a court of competent jurisdiction is a court with a grant of subject-matter jurisdiction covering the case before it.[15]

Congress' use of the phrase "of competent jurisdiction" implied that there must be *another* source of jurisdiction beyond the charter statute itself. The Court rejected Fannie Mae's suggestion that "competent jurisdiction" might only refer to personal jurisdiction or venue, rather than subject matter jurisdiction, and concluded that it required an independent source of subject matter jurisdiction.

The Court further noted its conclusion was consistent with *Red Cross's* synthesis of prior cases. Specifically, the Court noted that *Red Cross* did not create a black-letter rule that a statutory charter would automatically create subject matter jurisdiction by simply mentioning federal courts. A "sue-and-be-sued" provision that only generally creates the power to sue in federal court, is not enough to confer jurisdiction; the Fannie Mae statute was "merely capacity conferring."[16]

The Court rejected Fannie Mae's argument that, at the time its charter was enacted in 1954, the words "competent jurisdiction" were understood to confer jurisdiction. The Court observed that "none of the cases on which Fannie Mae relies suggest that Congress in 1954 would have surveyed the jurisprudential landscape and necessarily" understood this language to confer jurisdiction.[17] **SB**

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Endnotes

[1]769 F.3d 681, 682–683 (2014).

[2]505 U.S. 247 (1992).

[3]769 F.3d at 684.

[4]Specifically, the Court cited cases from the Ninth, First and D.C. Circuits to that effect. *See generally, Federal Home Loan Bank of Boston v. Moody's Corp.*, 821 F. 3d 102 (1st Cir. 2016); *Pirelli Armstrong Tire Corp. Retiree Medical Benefits Trust ex rel. Fed. Nat. Mortgage Assn. v. Raines*, 534 F. 3d 779 (D.C. Cir. 2008).

[5]The Supreme Court cited cases from the Second, Third, Fifth, and Seventh Circuits ruling in that fashion. *See generally, Western Securities Co. v. Derwinski,* 937 F. 2d 1276 (7th Cir. 1991); *C. H. Sanders Co. v. BHAP Housing Development Fund Co.*, 903 F. 2d 114 (2d Cir. 1990); *Industrial Indemnity , Inc. v. Landrieu*, 615 F. 2d 644 (5th Cir. 1980) (per curiam); *Lindy v. Lynn*, 501 F. 2d 1367 (3d Cir. 1974).

[6]No. 14-1055, at 6.

[7]*Bank of United States v. Deveaux*, 5 Cranch 61, 85-86 (1809).

[8]*Osborn v. Bank of United States,* 9 Wheat. 738, 817-18 (1824).

[9]*Bankers Trust Co. v. Texas & Pacific R. Co.*, 241 U. S. 295, 302 (1916).

[10]*D'Oench, Duhme & Co. v. FDIC*, 315 U. S. 447, 455 (1942).

[11]*Red Cross*, 505 U. S., at 257.

[12]*Id.*, 505 U.S. at 255.

[13]12 U. S. C.§1723a(a).*Id.*

[14]*See Lightfoot,* No. 14-1055, at 9.

[15]*See id.* at 11.

[16]*See id.* at 15.

Mediating Civil Rights Cases Against Police Officers

Scott Young

From March 31, 2014 through March 31, 2015, there were 35,312 civil rights cases filed in federal district courts across the United States.[1] These cases range from claims for constitutional violations to discrimination in voting, employment, housing, disabilities, and education. They also include cases for police misconduct, such as unreasonable search and seizure, excessive force, and deadly force. Like all other cases in federal court, civil rights lawsuits against the police are typically resolved prior to trial. Often, they are resolved through mediation. Mediation provides parties with an opportunity to resolve disputes early, reduce costs, and avoid the risk of trial. However, mediating police misconduct cases differs from mediating other cases in several critical respects. This article discusses these differences and how they can be used in mediation to steer both plaintiffs and defendants toward settlement.

GENERAL FACTORS THAT INFLUENCE MEDIATING CIVIL RIGHTS CLAIMS AGAINST POLICE OFFICERS AND MUNICIPALITIES.

Mediating §1983 civil rights claims against police officers and municipalities is different than mediating common law negligence claims. Civil rights claims against the police concern allegations of wrongs by government, rather than private entities and individuals, and they hinge upon allegations of deliberate violations of statutes and the Constitution, rather than negligence. This changes the goals and expectations of the parties. A better understanding of this unique dynamic is essential to successfully mediating these claims.

The Nature of the Claim

Unlike other claims, plaintiffs in § 1983 civil rights claims assert that governmental actors and entities violated federal statutes or the Constitution. This changes the relationship between the parties significantly from a contract dispute or negligence claim. Plaintiffs often feel more hurt because they view police officers as public servants who should be protecting them, not injuring them. Because of this, civil rights plaintiffs can be more emotionally attached to the claim than other plaintiffs. Often, plaintiffs in civil rights claims desire not only money, but vindication of their rights. While this component of civil rights mediations is less tangible than the dollar amount, it can be just as important to reaching a resolution.

Police officers, too, are more emotionally attached to these claims than a typical defendant because of the gravity of the allegation against them. A civil rights violation rests on an accusation that a police officer deliberately violated the Constitution, the very document the officer took an oath to uphold. They often find the allegation of deliberate misconduct insulting. Successful mediation of such claims requires skilled navigation of the emotions of both the plaintiffs and the defendants.

Venue

Venue often determines the victor. This is true in all cases, including § 1983 civil rights cases. In any case, the composition of the prospective jury is critical. This famously played out in 1994 in the O.J. Simpson trial when the prosecution chose to file criminal charges in downtown Los Angeles, rather than in Santa Monica. William Hodgman, one of the prosecutors, was interviewed by Frontline for its 2005 program *The OJ Verdict,* and he stated, "We could have very well filed the case in Santa Monica. And if we could have done something differently to avoid all the grief that flowed thereafter, it would have been smarter for our office to have filed the case in Santa Monica."[2] Just as the venue impacted the verdict in the Simpson trial, venue impacts civil rights cases against police officers. Venues that are traditionally pro law enforcement can drive the value of the case down, while venues where people feel disenfranchised and distrust law enforcement will drive the value of the case up.

Cultural Climate

Jurors are selected from the community, and that community consumes news and participates in traditional and social media at an unprecedented level. The use of force by police has come under significant scrutiny in the last few years with incidents in Ferguson, Missouri, New York City, South Carolina and other locales occupying the front page of newspapers and prime time television across the nation. These incidents and the related media coverage have led to increased distrust in police. The New York Times noted that police cameras "have become ingrained in the nation's consciousness ... they have begun to alter public views of police use of force and race relations, experts and police officials say."[3] They also note that "[i]n a Gallup national survey conducted in June, 52 percent of people said they had "a great deal" or "quite a lot" of confidence in the police, down from 57 percent two years earlier, and 64 percent in 2004. In 2007, 37 percent of Americans had high confidence that their local police would treat blacks and whites equally, the Pew Research Center found, but last year that was down to 30 percent."[4] This shifting perception reflects the community of potential jurors and, consequently, must be considered in any mediation.

The Stress of Litigation

Justice Learned Hand once stated, "as a litigant I should dread a lawsuit beyond almost anything short of sickness and death."[5] Few experiences are as stressful as participating in litigation. As one psychotherapist described it:

It is a truism that we live in a litigious society, especially we Americans. So many individuals are involved in civil lawsuits that it may be a rare psychotherapist who has not had the experience of treating a current or former litigant. Despite our awareness that lawsuits are an everyday phenomenon, few psychotherapists or litigants are truly prepared for the forces of aggression that are released and sanctioned by our judicial system. Although it may be that we have exchanged swords and cudgels for subpoenas and depositions, an aura of combat continues to hover over the judicial process, and combat produces casualties.[6]

Recently, researchers at DePaul University studied the psychological impact of litigation and found that litigants often suffered symptoms found in those diagnosed with PTSD.[7] "Research suggested the groups with pending suits were significantly more depressed than the nonlitigant group."[8] "The study showed ... that those with suits still pending experienced more distress than those who settled."[9] "Our earlier study showed that ongoing litigation was a strong predictor of PTSD at one year."[10]

This is not limited to Plaintiffs, but applies to defendants as well. As one commentator has noted:

> The experience of being sued is unexpected, overwhelming, and difficult to process. And, it often cascades into a reaction known as malpractice litigation stress syndrome.
>
> A study concerning the emotional repercussions of litigation reported symptoms of isolation, negative self-image (in particular feeling misunderstood, defeated, or ashamed), development or exacerbation of physical illness, and subsequent depression. The prolonged nature of the litigation fosters depression, a sense of not being in control, and the associated feeling of helpfulness.
>
> Those who have gone through litigation also describe family suffering. Spouses and children experience a deep sense of loss, devastation, and social awkwardness. The threat further plays havoc with colleague relationships.[11]

Thus, litigation has an adverse effect on both plaintiffs and defendants, and a reasonable settlement is often better for both sides.

PRESSURE POINTS ON CIVIL RIGHTS PLAINTIFFS

In addition to the general factors discussed above, there are several pressure points that are unique to plaintiffs suing police officers that a mediator can utilize in mediation.

High Standard for Constitutional Violations

Unreasonable seizure and excessive force claims have high standards of proof. A police officer's use of force is unconstitutional where it is not "objectively reasonable." "The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[12] The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, ... nor by the mistaken execution of a valid search warrant on the wrong premises.[13] "With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[14] "As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[15] "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional."[16]

This is a very high standard. The baseball adage "tie goes to the runner" applies to police officers in civil rights lawsuits as well. Close calls go in favor of the officer and the plaintiff bears the burden of establishing that the police officer's conduct was outrageous. Thus, much more is required of the plaintiff than in a typical tort case.

Qualified Immunity for Police Officers

The defense of qualified immunity presents a substantial hurdle to a plaintiff s ability to recover from police officers and municipalities. It shifts the burden of proof to the plaintiff, and that burden is significant. When an officer asserts qualified immunity, the plaintiff must prove not only that the officer violated the Constitution, but that the precise constitutional right was clearly established.[17] The "clearly established" prong cannot be satisfied at a high level of generality. In 2011, the Supreme Court stated, "We have repeatedly told courts ... not to define clearly established law at a high level of generality. The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established."[18] The Supreme Court recently reiterated this point when it ruled that it was not clearly established that employing a new technique of deadly force violated the Constitution. [19]

In addition, rulings on qualified immunity are immediately appealable, to the extent they turn on an issue of law.[20] This means that all qualified immunity rulings on motions to dismiss are also immediately appealable because the allegations in the complaint are taken as true.

Summary judgment rulings are immediately appealable where there are no "material facts" in dispute. The availability of an immediate appeal presents two problems for plaintiffs. It gives the defendant officer(s) two chances to prevail on immunity, and even if the plaintiff ultimately prevails on the issue, they are forced to incur significant costs and delays. Moreover, in certain cases a jury verdict may succumb to qualified immunity where a savvy defendant submits special interrogatories regarding conduct to the jury and then asks the court in a post-trial motion for a directed verdict on qualified immunity grounds.

Difficulty in Proving a Municipal Custom or Policy

A municipality may not be held liable under 42 U.S.C. § 1983 merely because it employs a person who violated a plaintiff s federally protected rights.[21] Liability can only be imposed on the [municipality] only if a constitutional violation occurred

and the violation was caused by a government policy or custom.[22] There must be a direct causal link between the policy or custom and the officer's alleged constitutional violation.[23] This is very difficult to prove. Written policies are rarely unconstitutional, leaving a plaintiff to pursue an unconstitutional custom or practice. This is not only challenging to prove, but costly. Because such customs are unwritten, a plaintiff must typically analyze a series of similar cases and depose a host of other officers.

This is expensive, time-consuming, and may not lead to evidence that is admissible under Fed. R. Evid. 403.

Offer of Judgment

An offer of judgment under Fed. R. Civ. P. 68 can pose significant problems for a plaintiff. If a defendant makes an offer of judgment early in the case, the plaintiff must obtain a verdict greater than the offer or it will not be able to recover the attorneys' fees incurred after the offer of judgment. Thus, if the defendant has served an offer of judgment, the plaintiff must evaluate this risk very early in the case before he or she has had the opportunity to conduct any discovery. This can put the plaintiff at a significant disadvantage.

Plaintiffs who proceed to trial often do worse than if they had settled.

A recent study found that plaintiffs who reject settlement and proceed to trial typically recover less money than they would have received had they settled. The study found that "most plaintiffs who decided to pass up a settlement offer and went to trial ended up getting less money than if they had taken the offer."[24] Randall Kiser, co-author of the study, stated, "The lesson for plaintiffs is, in the vast majority of cases, they are perceiving the defendant's offer to be half a loaf when in fact it is an entire loaf or more."[25] The authors reached this decision after studying 2,054 cases that went to trial between 2002-2005. Such overvaluation presents a clear reason for a plaintiff to seriously consider settlement at mediation.

PRESSURE POINTS ON § 1983 POLICE OFFICERS AND MUNICIPALITIES.

Civil rights cases also feature several unique pressure points for police officers and municipalities.

Attorneys' Fees/or Prevailing Plaintiffs

"Congress enacted 42 U.S.C. § 1988 in order to ensure that federal rights are adequately enforced."[26] This statute allows a prevailing plaintiff to recover its reasonable attorneys' fees. Thus, the risk of a judgment against the defendant is compounded. Moreover, the further along the litigation proceeds, the higher plaintiff s attorneys' fees become. Unlike cases without such a fee provision, this can increase the value of a case as it proceeds. For example, in a typical personal injury case, a defendant may reason that if there are $1,000,000 in total damages and a 25% chance of losing, then the case is worth $250,000. The defendant may choose to pay more to avoid litigation costs, but that basic calculation does not change as the litigation proceeds. By contrast, a civil rights case with the same damages and chance of losing will increase in value as the case proceeds because the plaintiffs attorneys' fees increase. Thus, a case valued at $250,000 at one stage in the litigation will be worth more as the litigation advances and the plaintiff incurs additional attorneys' fees that may be recoverable. This often plays out if the plaintiff survives a summary judgment motion. The prospect of an adverse verdict compounded by the plaintiff's attorneys' fees places significant pressure on the defendants to settle.

Creating Bad Law

Because police officers and municipalities are repeat players in civil rights litigation, they must be concerned about litigating cases where an adverse ruling can set bad precedent. This is particularly true in the civil rights arena, where the defense of qualified immunity hinges on demonstrating that the officers did not violate "clearly established" law. Thus, defendants may want to settle defensible claims to avoid the risk of a ruling that would place them in a worse position in future cases.

Fact Issues Precluding Summary Judgment

Decisions on qualified immunity are not immediately appealable if there are fact issues.[27] Thus, a summary judgment order denying qualified immunity because there is a fact issue will proceed to trial, not to an interlocutory appeal before a circuit court of appeal. This often happens in excessive and deadly force cases where plaintiffs, officers, and witnesses remember the critical events differently. For instance, an excessive force case stemming from a dog bite would not be a likely candidate for summary judgment if an officer and the suspect disagreed about whether the officer shouted warnings before releasing the canine. If a case cannot be resolved through a motion, then the defendants must choose to either settle the case or take their chances with a jury.

Morale of the Police Force

The Washington Post recently reported that "Chiefs of some of the nation's biggest police departments say officers in American cities have pulled back and have stopped policing aggressively as they used to."[28] Discussing the "Youtube Effect," Sergeant Andrew Romero, chairman of the Austin Police Association's Political Action Committee, said "It affects recruiting, retention and morale."[29] Litigation can cause declining morale within the department, particularly if the incident at issue is replayed in local, or national, news. Department morale must be considered by police officers and municipalities defending civil rights lawsuits.

Morale of the Community

Police officers may also want to settle in order to buy peace in the community. Former Baltimore Mayer Kurt Schmoke intimated that this was a concern in Baltimore's recent settlement with Freddie Gray's family. Baltimore settled the lawsuit for $6.4 million, which Mr. Schmoke described as "The mayor and her staff are trying to do all they can to heal the wounds in the community, and this is a step in the right

direction. This settlement will give some people in the community at least some sense of justice. "[30] Police officers need public support to effectively combat crime and particularly in high-profile cases, public outreach may provide some basis for settling a claim.

Divergent interests between Officers and Governmental Entity

The police officers involved in the incident and the municipalities may have different interests in the litigation. For example, a police officer may want the case to be resolved as soon as possible in order to rid him or herself of the stress of litigation and move on; however, the entity may not want to settle what it believes is a frivolous claim. This can result in friction between the officer and the police force, even if they are represented by separate counsel.

Settlement may be worthwhile in order to avoid such conflicts.

CONCLUSION

Civil rights claims against police officers and municipalities pose many unique challenges to mediation. In addition to the standard concerns regarding stress and protracted litigation, there are emotional components and legal defenses and risks that are in play. A skilled mediator must be aware of these issues and address them in order to successfully guide the parties toward resolution. **SB**

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Endnotes

[1]*See* Federal Judicial Caseload Statistics, 2015, Table C-3.

[2]*See* Interview with William Hodgman, *The O.J Verdict* (Oct. 4, 2005), www.pbs.org/wgbh/pages/frontline/oj/interviews/hodgrnan.htrnl.

[3]Richard Perez-Pena and Timothy Williams, *Glare of Video is Shifting Public's View of Police,* N.Y. Times (July 30, 2015), www.nytirnes.com/2015/07 /31/us/through-lens-of-video-a transformed-view-of-police.html?

[4]*See Id.*

[5]Hand L., *Deficiencies of trial to reach the heart of the matter: three lectures on legal topics,* Association of the Bar of the City of New York, 89:105 (1926).

[6]Dr. Larry H. Strasburger, *The Litigant-Patient: Mental Health Consequences of Civil Litigation,* J. Arn. Acad. Psychotherapy Law, Vol. 27, No. 2 (1999).

[7]*See* Hickling, Edward, Edward Blanchard, and Matthew T. Hickling, *The Psychological Impact of Litigation: Compensation Neurosis, Malingering, PTSD, Secondary Traumatization, and Other Lessons from MVAs,* DePaul Law Review, Vol. 55, Issue 2, Winter 2006, Article 15, at p. 625 (citations omitted).

[8]*Id.*

[9]*Id.,* 625-626.

[10]*Id.,* 626.

[11]Tunajek, Sandra, *Dealing with Litigation Stress Syndrome,* AANA News Bulletin (July 2007), www.aana.com/resources2/health-wellness/Docurnents/nb mile-stone 0707 .pdf.

[12]*Graham v. Connor,* 490 U.S. 386, 396 (1989) (citations omitted).

[13]*Id.* (Citations omitted)

[14]*Id.* (Citations omitted).

[15]*Id.*, at 397.

[16]*Id.*

[17]*See Pearson v. Callahan,* 555 U.S. 223, 232 (2009).

[18]*Ashcroft v. al-Kidd,* 131 S.Ct. 2074, 2084 (2011).

[19]*See Mullenix v. Luna,* 136 S.Ct. 305 (2015).

[20]*See Behrens v. Pelletier,* 116 S.Ct. 834, 841 (1996).

[21]*See Monell v. New York City Dep 't of Social Servs.*, 98 S. Ct. 2018, 2037-2038 (1978).

[22]*See City of Los Angeles v. Heller,* 475 U.S. 796, 799 (1986).

[23]*See City of Canton v. Harris,* 489 U.S. 378, 385-86 (1989).

[24]Jonathan D. Glater, *Study Finds Settling is Better than Going to Trial,* New York Times (Aug. 7, 2008), www.nytimes.com/2008/08/08/business/08law.html.

[25]*See Id.*

[26]*Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 550 (2010).

[27]*See Johnson v. Jones,* 515 U.S. 304 (1995).

[28]*See* Aaron Davis, ""Youtube Effect" Has Left Police Officers Under Siege, Law Enforcement Officers Say," Washington Post (Oct. 8, 2015), www.washingtonpost.com/news/postnation/wp/2015/10/08/youtube-effect-has-left-police-officers-under-siege-law-enforcement leaders-say/?utm term= .af98feb7439e.

[29]Noble, Andreas, "Police fear "Youtube Effect" Affecting Work, Contributing to Rise in Violent Crime, Washington Times (Oct. 25, 2016), www.washingtontimes.com/news/2015/oct/25/police-fear-youtube-effect-affecting-work contribu/.

[30]Yvonne Wenger and Mark Puente, *Baltimore to pay Freddie Gray's family $6.4 million to settle civil claims,* Baltimore Sun (Sep. 8, 2015), www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-boe-2015 0908-story.html.

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Tower Of Babel Or Court Of Confusion?: Federal Courts And Foreign Languages; Part I: Document Translation

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"The translator, like the witness called to trial, should be compelled to raise his hand and swear to tell the truth and nothing but the truth." Henry Wadsworth Longfellow[1]

INTRODUCTION

Tower of Babel or Court of Confusion? The stakeholders in the federal courts can fairly be characterized as a mosaic of diverse nationalities, ethnicities, and languages. Linguistic chaos, confusion, and/or incomprehension cannot be allowed to contaminate the courtroom environment or interfere with fact-finding, deliberations, or due process under the law. Accordingly, federal district courts gainfully utilize the services of language interpreters (or sign language interpreters) under applicable provisions of federal law in the context of proceedings wherein the parties or witnesses have communication difficulties relative to English.

United States courts and government agencies,[2] not to mention state agencies (*e.g.*, motor vehicle departments), routinely require certified translations of transcripts and other legal documents in order to validate the precision of translations.[3] Moreover, as a general rule, any foreign-language source documents proffered to an American federal court as evidence must have a concomitant English-language translation. Notwithstanding the foregoing, there are no standards or uniform federal rule, or approved validation or certification process, relating to translation of foreign language source documents or to the qualifications or competence of translators.

For a variety of reasons, and on a number of levels, all of the participants in civil and criminal cases -- parties, witnesses, experts, lawyers, judges and, if applicable, juries -- of necessity, must have, and are entitled to, the benefit of accurately translated documents. Veteran litigators are cognizant, and rightly concerned, that all of the foreign-language source documents pertinent to the case must be: (a) identified, isolated, and secured; (b) properly translated; (c) fully comprehended; and (d) admitted into evidence by the court.

Despite these realities of the litigation trenches, the rules of engagement for achieving these admirable goals are as murky as the Potomac. Somewhere along the river of rules, the acts of oral interpretation and documentary translation drifted apart into two divergent branches; while the former stayed the course and made it to a sheltered procedural port, the latter seems to be hopelessly encircling a whirlpool in the same dark muddy waters.

In 1995, with the enactment of the Court Interpreters Act ("CTIA"),[4] Congress mandated, *inter alia*, the use of certified and otherwise qualified interpreters in the context of judicial proceedings. In that vein, Rule 604 of the Federal Rules of Evidence provides, *in toto*, as follows:

"Interpreter. An interpreter must be qualified and must give an oath or affirmation to make a true translation."

Surprisingly, and lamentably, however, the CTIA fails to extend to documentary translations for foreign language documents or to translators thereof. Moreover, albeit some states[5] have promulgated well-considered rules regarding foreign document translations, the Federal Rules of Evidence remain inexplicably mute on this paramount language issue.

HISTORICAL SETTING

The etymology of the noun "translation" - meaning to turn one language to another - is readily discernible. Dating back to around the early 14th century, it stems from the Old French Anglo-Norman *translacion* (the rendering of a text from one language to another) and, of course, the Latin *translatio* (translation) and *liber translatus* (a work translated).[6]

In biblical legend, "the whole world had one language and a common speech."[7] Incurring the Lord's wrath for being too enterprising and arrogant enough to attempt to construct an edifice to heaven itself, the legendary Tower of Babel remained an unfinished work, sinking ingloriously into the sands of antiquity. Meanwhile, the perplexed, hitherto mono-linguistic people of Babylonia, who could no longer understand each other, were promptly "scattered over the face of the whole earth."[8] Philological scholars have noted that the name "Babel," the Jewish term for Babylon, also was similar to the transliterated Hebrew verb, *balal*, which means "to mix, mingle, or confuse."[9]

The history of documentary translation is a long and honored one. The ancient Greeks in Alexandria translated earlier Hebrew scriptures (the Bible and some related texts) into a monumental translation work known as the "Septuagint" between 300-200 B.C.E.[10] Subsequently, around 384 A.D. Saint Jerome -- often referred to as the Patron Saint of Translators -- translated what later became known during the 16th century as the standard Latin "Vulgate" Bible.

The Arabs and Muslims, having conquered the Greeks, deciphered many works from the original Koine Greek texts. Additionally, Greek works enthusiastically were rendered into Latin during the reigns of the various Roman conquerors.

During the Middle Ages, of course, Latin was the *lingua franca* of the scholarly class in the Western World. In 13th century Spain, for example, King Alphonse the Wise founded a translation school in Toledo (*to wit*, *The "Schola* Traductorum"),[11] where Hebrew, Arabic, and Latin texts were decoded into still other world languages. In 14th century England, Geoffrey Chaucer[12] adapted the Italian author Giovanni Boccaccio's works into the former's celebrated works, "The Knight's Tale" and "Troilus and Criseyde".

The Spanish literary giant, Cervantes, writing in the nascent years of the 17th century,[13] ostensibly did not hold a very high opinion of translators or their art:

"'I would venture to swear,' said Don Quixote, 'that your worship is not known in the world, which always begrudges their reward to rare wits and praiseworthy labours. What talents lie wasted there! What genius thrust away into corners! What worth left neglected! Still it seems to me that translation from one language into another, if it be not from the queens of languages, the Greek and the Latin, is like looking at Flemish tapestries on the wrong side; for though the figures are visible,

they are full of threads that make them indistinct, and they do not show with the smoothness and brightness of the right side; and translation from easy languages argues neither ingenuity nor command of words, any more than transcribing or copying out one document from another. But I do not mean by this to draw the inference that no credit is to be allowed for the work of translating, for a man may employ himself in ways worse and less profitable to himself.'" Miguel de Cervantes Saavedra[14]

Indeed, it would appear that, depending upon the century, the practice and vogue in translating vastly differed. To illustrate, in 17th century Europe, there seems to have been more concern for artistic and stylistic issues as opposed to verbal accuracy. Later, in the 18th century, the translators' mantra changed to ease of popular reading, while the 19th century saw more emphasis placed upon technical precision. It was not until well into the 20th century that faithful accuracy was elevated to its well-deserved lofty pedestal.

Modern English translations of old or original language texts certainly will serve to help a reader better digest and comprehend legal masterpieces such as Cicero's *De Legibus*,[15] Justinian's *Codex Justinianus*,[16] or the Code Napoléon.[17] However, for courtroom purposes nowadays, translations most assuredly are judged by a decidedly higher standard, if not as to artistic effect and style, then as to unswerving fidelity and technical exactitude *vis-a-vis* the foreign source document.

USING FOREIGN LANGUAGE DOCUMENTS IN COURT, GENERALLY

As a rule of thumb, for legal and official purposes, evidentiary documents and other official documentation normally are mandated to be in the official language(s) of a particular jurisdiction. Nevertheless, the procedure for translating for so-called legal equivalence differs from nation to nation.

In some countries, for example, it is a requirement that a translator swear an oath to attest that it is the legal equivalent of the source text. Often, only translators of a special class are authorized to swear such oaths. In some cases, the translation is only accepted as a legal equivalent if it is accompanied by the original or a sworn or certified copy of it. Even if a translator specializes in legal translation, or is a lawyer in his (her) country, this does not necessarily make him (her) a sworn translator. In a number of countries, mere "declared competence" by a translator will pass muster. Yet, other nations require a translator to be officially appointed by the government.

Sworn translation, then, also sometimes referred to as a "certified translation," shoots for legal equivalence between two (2) documents, the original of which is penned in a different source language. Such a translation should be performed by someone authorized so to do by applicable statutes, court rules, or agency regulations.

FOREIGN LANGUAGES IN THE U.S. FEDERAL COURTS, GENERALLY

According to the U.S. Department of Labor, Bureau of Labor Statistics, "[t]here is currently no universal form of certification required of interpreters and translators in the United States, but there are a variety of different tests that workers can take to demonstrate proficiency."[18] To be sure, court interpreters are highly-skilled professionals in both simultaneous and consecutive reporting tasks; the lawyers, judges, and other players in the American justice system heavily depend upon the interpreters to keep the gears of the machinery of justice in perpetual, if glacial, motion. Translators of documents also are pressed into service in order to provide a vital function.

Well over a hundred diverse tongues require language interpretation in federal court proceedings in any given year. Needless to say, the lion's share of the cases involve Spanish speakers. Other languages involved with some measure of frequency include, but are not limited to, Mandarin and Cantonese Chinese, Vietnamese, Arabic, Korean, Russian, Portuguese, and Haitian Creole.

Examining the lineage of our federal court precedents, it becomes crystal clear that all federal court proceedings must be conducted in the English language. The cases so holding are legion. Moreover, any witness who does not speak English well enough to understand the proceedings must be afforded the benefit of an interpreter.

FOREIGN LANGUAGE DOCUMENTS IN U.S. FEDERAL COURTS

If we accept the principle that all U.S. federal court proceedings must be held in English (including in the District of Puerto Rico, where 95% of the population speaks Spanish),[19] then, *a fortiori*, any documents sought to be entered into evidence during the course of such proceedings must likewise be in English.

"[I]t is clear, to the point of perfect transparency, that federal court proceedings must be conducted in English." *United States v. Rivers-Rosario*. [20] In that case, the court also noted the "well-settled rule that parties are required to translate all foreign language documents into English."[21]

Appellate tribunals likewise have made it clear that the erroneous admission of foreign-language documents violates the so-called English Language Requirement. *See, e.g., United States v. Diaz* (where untranslated foreign passports and travel documents were erroneously admitted).[22] *See also United States v. Contreras Palacios*[23] (wherein it was held to be error that both a birth certificate and *cedula* [identity card] in the Spanish language were offered by the government into evidence unaccompanied by translations into English.)

The results of failing to have such translations properly admitted into evidence can be disastrous for both litigator and client alike. *See, e.g., Krasnopivtsev v. Ashcroft*[24] wherein a copy of a passport was held to have been properly excluded from evidence where no English translation or certification was offered. *See also Lopez-Carrasquillo v. Rubianes*[25] wherein the court declined to consider a deposition excerpt as part of the record on summary judgment because the party proffering same had failed to submit an English translation; *United States v. Cruz*,[26] in which case the Eleventh Circuit Court of Appeals, confronted with a situation where the defendant had engaged in a "deliberate tactical decision" not to submit an English translation of a Spanish-language tape, held that he could not complain on appeal that the jury's function was usurped when he had failed to present evidence that would have aided the jury in fulfilling that function); and *Heary Bros. Lightning Protection Co., Inc. v. Lightning Protection Institute et al,*[27] where the court, *sua sponte,*

struck plaintiff's exhibits as inadmissible, on the ground that the exhibits were not in English and that no translations had been provided with respect thereto.

Another stark illustration of the potentially devastating effect of an epic translation failure is provided by the *Villalobos* case.[28] A few years back, the U.S. Court of Appeals for the Eleventh Circuit refused to reverse an immigration ALJ who had ordered a deportation largely for lack of evidence because, as the BIA noted, the petitioner had only provided an unsigned statement, unaccompanied by a certificate of translation, and had failed to address the claim raised in her motion.

A review of the relevant authorities further reflects that a producing party, in a vacuum, has no duty to translate documents regularly kept in a foreign language. *See, e.g., In re P.R. Elec. Power Authority.*[29] However, in order to utilize such documents and have them admitted into evidence, they will have to be translated and exchanged during the discovery process.

The question next arises as to which party should be obliged to shoulder the burden of the costs of translating documents in discovery. It is well-settled that each party seeking discovery is expected to bear any special attendant costs, which costs encompass the cost of translating foreign language documents received in response to document requests. Thus, an objective study of the case law under Rule 34 (document production) reveals that the requesting party ordinarily must bear the burden.[30] However, when a party responds to an interrogatory by producing documents written in a foreign language, Rule 33(d) requires that the responding party provide a translation of those documents.

The cost of translating foreign language documents is by no means *de minimis*. In the Miami, Florida area, for example, the market rate for a Spanish-English translation appears to be 25 cents per word. Extrapolate that cost, for example, to a 12 page document (approximately 4,000 words); the cost would be $1,000.00 (U.S.D.).

Under Title 28, U.S. Code Section 1920, it is commonplace that the compensation to "interpreters" is among the costs that may be awarded to prevailing parties. What about taxing the expense of document translation as costs for purposes of awards to prevailing parties in federal actions?

The issue thus presented to the United States Supreme Court was whether costs incurred in translating documents were "compensation of interpreters" under 28 U.S.C. Section 1920(6)? The high court's answer was in the negative.

Notably, however, as opined by Justice Ginsberg, in the context of her dissenting opinion in *Taniguchi v. Kan Pacific Saipan, Ltd., d/b/a Marianas Resort and Spa,*[31] over many years of practice, a number of district courts have awarded costs for document translations on a variety of grounds or theories. Faced with this thorny issue, some courts have held that costs may be awarded under §1920 subdivisions (4) or (6) for the translation of documents necessary to, or in preparation for, litigation.[32] Savvy practitioners would be well-advised to check yet another option; because, alternatively, as Justice Ginsberg also pointed out, some district courts allow fees for foreign document translation by way of their respective local rules.[33]

As a matter of black letter law, the majority of the U.S. Supreme Court in the *Taniguchi* case, by a vote of 6-3, reversed the Ninth Circuit Court of Appeals and slammed shut the Section 1920 statutory door on recouping the costs of document translation. Justice Alito, writing for the court, expressly held that the "compensation of interpreters" in Section 1920(6) does **not** include the costs of document translation.

While there is no federal law or local rule pertaining to the qualifications for a translator of written documents, it ought to be noted that some courts or their Clerk's Offices do have filing requirements to the effect that "[d]ocuments not written in English must be accompanied by a translation unless a waiver has been granted by the court."[34] Translators of foreign documents need to possess excellent linguistic skills in both the original source language and the target language. In addition, the translator must be aware of, and adjust for, colloquialisms, dialects, idioms, regional differences, slang and, last but not least, legal terminology. Nevertheless, there are no accepted or uniform certifications, examinations, interviews, licenses, tests, or validations for document translators that we can point to.

What, then, does a "certification" mean in relation to a document translator? One thing is certain; it does **not** mean "federal court certified translator," inasmuch as there is no such appellation extant. One approach that a seasoned litigator may adopt is to only utilize the services of an ATA-certified translator, although there is no strict requirement therefor imposed by the federal rules or courts so to do. The ATA is the American Translators Association. Many folks in the legal translation industry have considered this as a smart, or best, practice for the last half century or so. In the author's view, teaming up with a translator that is ATA-certified can serve to ensure that the translations not only will be accurate but, equally important, will be admissible in evidence and accepted by the court.

As and for other, pertinent best practices during litigation, it is strongly recommended that the litigator introduce both the source foreign language documents and the translated versions as exhibits at both deposition and at trial. In addition, under ordinary circumstances, it would seem eminently prudent to secure an affidavit or declaration attesting to the translator's qualifications and certifying that the English translation is both true and accurate.

CONCLUSION

There is a saying in the Southwest region of our great nation … "[e]verything's bigger in Texas." Certainly, the Code of Evidence down there is King-Sized; they even have one more rule in Article X than does the Federal Rules of Evidence. That extra heaping helping of jurisprudence serves to satisfy even the most discerning legal tastes and evidentiary palettes.

Thus, as to the field of foreign document translations, Texas legislators appear to have bolted from the starting gate, leaving the feds lagging far behind in the statutory dust. As previously mentioned, Rule 1009 of the Texas Rules of Evidence[35] expressly deals with the topic of "Translation of Foreign Language Documents," providing, in pertinent part, as follows:

"…translation of foreign language documents shall be admissible upon the affidavit of a qualified translator setting forth the qualifications of the translator and certifying that the translation is fair and accurate."

It readily must be observed that the Texas rule comprehensively covers the subject-matter, treating translations, objections

thereto, effect of failure to object or offer conflicting translation, effect of objections and of conflicting translations, expert testimony of translators, and court appointments. In so doing, it must be viewed as markedly superior when compared to the Federal Rules of Evidence which, as noted above, are rather conspicuous in their silence on this significant subject.

Beyond peradventure of doubt, the Texas rule regarding translations has much to commend it. That is to say; Texas jurisprudence does not attempt to skirt around or shy away from the issue; rather, it's fixin' to bring down and rope this bull of a problem head-on. Or, as a Texas jurist might say, "don't mess with Texas; this ain't our first procedural rodeo." **SB**

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Endnotes

[1]Longfellow, the celebrated American poet, was a professor of Italian at Harvard University. In 1867, he completed his renowned translation of Dante Alighieri's Divine Comedy. culturesconnection.com/20-quotes-about-translation/, retrieved February 24, 2017.

[2]For example, the U.S. State Department and the USCIS require that "[a]ny document containing foreign language submitted to the Service shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English."

[3]Another example is provided by the Rules for the Federal Trade Commission. Under Title 16 C.F.R. Section 803.8, documentary materials in a foreign language are "required to be submitted …with verbatim English language translations or all existing English language versions, or both…" *See also* C.F.R. Title 21, Part 10, Section 10.20 (c) (2), which regulation requires submission of verified English translations of foreign documents.

[4]Title 28, U.S. Code Section 1827.

[5]*See, e.g.,* Texas Rule of Evidence 1009.

[6]Cassell's New Latin Dictionary 857 (1968 ed.).

[7]*Genesis*, 11:1.

[8]*Id.*, at 11:9.

[9]The NAS Old Testament Hebrew Lexicon, www.biblestudy-tools.com, retrieved on February 24, 2017.

[10]The Septuagint (sometimes referred to as "LXX") was named in Latin for the 70 scholars commissioned by Ptolemy Philadelphus to perform the translation tasks. www.septuagint.net, retrieved on February 24, 2017.

[11]Alfonso X (Alphonso El Sabio)(1221-1284). During his reign, Alphonso retained Christian, Jewish, and Muslim scholars at court for his royal *scriptorium*, where books were translated from the Arabic and Hebrew into Latin and Castilian (Spanish).

[12]Geoffrey Chaucer (1343-1400), known as the Father of English Literature, also translated Roman de la Rose and Boethius' Consolation of Philosophy.

[13]Don Quixote (the full title was "The History of the Valorous and Wittie Knight-Errant Don-Quixote of the Mancha") was first published in 1605.

[14]Miguel de Cervantes Saavedra, Don Quixote, Second Part, Chapter LXII. Ironically, Don Quixote would go on to become the most translated book in the world, second only to the Bible, having been translated into over 50 languages.

[15]"On the Laws." Marcus Tullius Cicero (106-43 B.C.) was an ancient Roman statesman, philosopher and, by all accounts, a brilliant lawyer.

[16]Justinian I, a/k/a Justinian the Great, Eastern Roman Emperor (527 – 565 A.D.) The *Corpus Juris Civilius* (Body of Civil Law) was issued from 529-534.

[17]The Napoleonic Code, a/k/a Code Civil des Français, entered into force on March 21, 1804, and was drawn up by four eminent jurists; interestingly, it was not derived from earlier French laws, but rather from Justinian's Code (*see* discussion and note xvi, above).

[18]Archived October 11, 2007, in the Wayback Machine.

[19]*See* Title 48, U.S. Code, Section 864. "The laws of the United States relating to appeals, certiorari, removal of causes, and other matters or proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the United States District Court for the District of Puerto Rico and the courts of Puerto Rico. All pleadings and proceedings in the United States District Court for the District of Puerto Rico shall be conducted in the English language."

[20]300 F.3d 1, 5 (1st Cir. 2002).

[21]*Id.*, 300 F. 3d, at 7, n. 4. *But see Torres Santa et al v. Rey Hernandez et al,* 279 F. Supp. 2d 124 (D. P.R. 2003)(wherein Judge Perez-Gimenez opines as to the problems with the First Circuit's *Rivera-Rosario* decision and admits Spanish language documents).-

[22]519 F. 3d 56 (1st Cir. 2008). (Error deemed not plain error and not fatal to Defendant's conviction because evidence was submitted for limited purpose and defendant failed to object at trial).

[23]492 F. 3d 39, 43 n. 7 (1st Cir. 2007). (Even though an interpreter had orally translated the two documents for the District Court, it was nevertheless held to be error.)

[24]382 F.3d 832, 838 (8th Cir. 2004).

[25]230 F.3d 409, 413-14 (1st Cir. 2000).

[26]765 F.2d 1020, 1023 (11th Cir. 1985).

[27]287 F. Supp. 2d 1038, 1074 (D. Ariz. 2003).

[28]*Maria Villalobos v. U.S. Attorney General*, Case No. 11-12758, June 17, 2011 (11th Cir. 2012).

[29]687 F.2d 501 (1st Cir. 1982).

[30]*See Sungjin Fo-Ma, Inc. v. Chainworks, Inc., Civil Action No. 08-CV-12393, 2009 WL 2022308, at *4-5 (E.D. Mich. July 8, 2009). See also In re Puerto Rico Elec. Power Auth.*, 687 F.2d 501, 506 (1st Cir. 1982).

[31]566 U.S. 560, 132 S. Ct. 1997, 182 L. Ed. 2d 903 (2012).

[32]"Most federal courts of appeals confronted with the question have held that costs may be awarded under §1920(6) for the translation of documents necessary to, or in preparation for, litigation. Compare 633 F. 3d 1218, 1220–1222 (9th Cir. 2011); *BDT Prods., Inc.* v. *Lexmark Int'l, Inc.*, 405 F.3d 415, 419 (6th Cir. 2005); *Slagenweit* v. *Slagenweit*, 63 F.3d 719, 721 (8th Cir. 1995) *(per curiam);* and *Chore-Time Equip., Inc.* v. *Cumberland Corp.*, 713 F.2d 774, 782 (CAFC, 1983) (all holding that costs for document translation are covered by §1920(6)), with *Extra Equipamentos E Exportação Ltda.* v. *Case Corp.*, 541 F.3d 719, 727–728 (7th Cir. 2008) (costs for document translation are not covered by §1920(6)). See also *In re Puerto Rico Elec. Power Auth.*, 687 F.2d 501, 506, 510 (1st Cir. 1982) (recognizing that costs of document translation may be reimbursed, without specifying the relevant subsection of §1920); *Studiengesellschaft Kohle mbH* v. *Eastman Kodak Co.*, 713 F.2d 128, 133 (5th Cir. 1983) (allowing document translation costs under §1920(4)); *Quy* v. *Air Am., Inc.*, 667 F.2d 1059, 1065 (CADC 1981) (allowing "translation costs" under §1920(6))." Slip Opinion, *Taniguchi*, *supra*, Dissenting Op., at pp. 2-3.

[33]"Currently, some federal district courts make the practice of allowing fees for translation of documents explicit in their local rules. See Rule 54–4.8 (CD Cal. 2012) (allowing "[f]ees for translation of documents . . . reasonably necessary to the preparation of the case"); Rule 54.1 (Guam 2011) (same); Rule 54.1(c)(7) (Idaho 2011) (allowing reasonable fee if the "document translated is necessarily filed or admitted in evidence"); Rule 54.7 (MD Pa. 2011) (same); Rule 54.1 (Ariz. 2012) (same); Rule 54.1(b)(4)(e) (SD Cal. 2012) (same); Rule 54.1 (NJ 2011) (same); Rule 54–5(d) (Nev. 2011) (same); Rule 54.2 (NM 2012) (allowing translator's fee if the translated document is admitted into evidence); Rule 54.1(c)(4) (SDNY 2012) (allowing reasonable fee if translated document "is used or received in evidence"); Rule 54.1(c)(4) (EDNY 2012) (same). See also Rule 54.03(F)(1)(c) (SC 2012) (allowing costs of certain document translations under §1920(4)); Rule 54.1(b)(5) (Del. 2011) (same); Rule 54(c)(3)(i) (Conn. 2011) (same); Misc. Order ¶7, Allowable Items for Taxation of Costs (ND Fla. 2007) (allowing "fee of a competent translator of a non-English document that is filed or admitted into evidence"); Taxation of Costs Guidelines (PR 2009) (allowing fees for translation of documents filed or admitted into evidence), available at www.prd.uscourts.gov/courtweb/pdf/taxation_of_costs_guidelines_2007_with_time_computation_amendments.pdf (All Internet materials as visited May 17, 2012, and included in Clerk of Court's case file); Taxation of Costs (Mass. 2000) (allowing fees "for translation of documents... reasonably necessary for trial preparation"), available at www.mad.uscourts.gov/resources/pdf/taxation.pdf." Slip Opinion, *Taniguchi*, *supra*, Dissenting Op., at p. 4, n. 2.

[34]U.S. D.C., S.D. Fla., Section 2N, Civil Filing Requirements.

[35]Effective March 1, 2013.

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